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NO. PD-0244-16

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

ANDRE JAMMAR ASH
Appellant
V.
STATE OF TEXAS
Appellee

APPEAL FROM THE TENTH COURT OF APPEALS
NO. 10-14-00405-CR
AND FROM THE 82ND DISTRICT COURT OF FALLS COUNTY

BRIEF FOR APPELLANT

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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TRIAL JUDGE

The Honorable Robert Stem
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Falls County Courthouse
Marlin, Texas 76691

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STATEMENT OF THE CASE

The State of Texas indicted Mr. Ash for the offense of Possession of a Controlled Substance, Cocaine, Over Four Grams but Less Than 200 Grams (enhanced).[1] A trial was held beginning on December 2, 2014 with the Honorable Judge Robert Stem, presiding. The jury returned a verdict of guilty.[2] The punishment proceedings were tried to the court. A sentence of 35 years in the Texas Department of Criminal Justice, Institutional Division, and a fine of $5000.00 (FIVE THOUSAND AND no/100 DOLLARS) was handed down in open court on December 11, 2014.[3] The trial court certified Appellant's right to appeal his conviction.[4] Appellant timely filed the Notice of Appeal on December 19, 2014.[5] In a memorandum opinion, Appellant's issues were overruled by the Waco Court of Appeals, affirming the judgment.[6] This Court granted review on September 14, 2016.

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1 (I C.R. at 6).

2 (I C.R. at 21).

3 (I C.R. at 26).

4 (I C.R. at 25).

5 (I C.R. at 35).

6 *Ash v. State*, No. 10-14-00405-CR, 2016 WL 455121, at *2 (Tex. App.—Waco Feb. 4, 2016, pet. granted) (mem. op., not designated for publication).

GROUND FOR REVIEW PRESENTED

The Waco Court of Appeals erred in holding, without formal charges, an accomplice witness can only be classified as a matter of fact and cannot be an accomplice as a matter of law.

STATEMENT OF THE FACTS

A late evening traffic stop in Marlin, Texas unraveled into a host of finger-pointing and accusations between the passengers of a vehicle. Mr. Ash, the owner of the truck and one of five persons inside the vehicle was ultimately indicted and convicted of a possession of a quantity of cocaine.

A Marlin, Texas police officer was patrolling and saw a vehicle with "its high beams on."[7] Eventually, the officer smelled the "odor of burnt marijuana" coming from the vehicle.[8] Seeing a rear passenger "stuffing something under her seat,"[9] a decision was made to pull out all of the passengers in the vehicle.[10] Relying upon the smell of marijuana for probable cause, the officers searched the truck.[11] The officer found a white plastic bag in the door panel of a passenger side door.[12] This package

7 (3 R.R. at 158).

8 (3 R.R. at 161).

9 (3 R.R. at 164).

10 (3 R.R. at 164).

11 (3 R.R. at 164).

12 (3 R.R. at 167–68).

allegedly contained powder cocaine weighing 41.63 grams.[13] All five persons were arrested.[14] However, Mr. Ash was the only person indicted for the alleged offense.

The four other occupants, the ex-girlfriend of Mr. Ash and three "dancers," all testified for the State in this matter. Deondra Medford, one of the three "dancers" testified that she was an acquaintance of Mr. Ash.[15] Upon suggestion by Mr. Ash, Ms. Medford, Keandra Jennings, and Demarshaye Alexander all accompanied Mr. Ash to purportedly go dance in Houston, Texas.[16] Mr. Ash's girlfriend, Jefferi Varnado also went along.[17]

A strip club in Houston was not the first stop. According to Ms. Medford, Mr. Ash insisted on attempting to find a synthetic marijuana product called "Spice."[18] After being successful at locating the synthetic marijuana, it was "still too early"trio of dancers "to go to the clubs."[19] Purportedly, Mr. Ash suggested a trip to Crockett, Texas, "which is where he is from and he said to go be with country boys."[20] Arrival

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13 (3 R.R. at 171, 192–93).

14 (3 R.R. at 173).

15 (3 R.R. at 185–86).

16 (2 R.R. at 187–88).

17 (2 R.R. at 192).

18 (2 R.R. at 194).

19 (2 R.R. at 194).

20 (2 R.R. at 194).

in Crockett was estimated to be around 6 PM.[21] During the trip from Houston to Crockett, the three strippers were smoking marijuana.[22] Ms. Varando was smoking "Spice."[23]

According to Ms. Varnado, the trip to Crockett was not entirely social. Ms. Varnado stated that Mr. Ash would return weekly to Crockett to "buy drugs."[24] Ms. Varnado dropped the trio of dancers off at one of Mr. Ash's friends house, and proceeded to Walmart to pick up a money order.[25] The three strippers went inside the home, and saw a man counting a large sum of money.[26] Eventually, Mr. Ash "got into it" with the representative from the club in Houston where the girls were to dance.[27] Before leaving Crockett, all five people go to a small club, where the three strippers find a source for "Xanax bars."[28] Finally a decision was reached to return to Killeen,

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21 (2 R.R. at 195).

22 (3 R.R. at 80).

23 (3 R.R. at 80).

24 (3 R.R. at 74–75).

25 (3 R.R. at 81–82).

26 (3 R.R. at 21–22).

27 (3 R.R. at 25–26).

28 (3 R.R. at 28–29).

Texas.[29] After switching drivers, the vehicle was eventually stopped in Marlin, where the cocaine was found.

[29] (3 R.R. at 32).

SUMMARY OF THE ARGUMENT

Ignoring 62 years of decisions from this Court, the Waco court of appeals found that this Court had "vacillated" on whether one had to be officially charged to be an accomplice as a matter of law. Reviewing the record, the court of appeals found that since no official charges, such as an indictment or information had been presented against the codefendants, no such instruction was necessary. The court of appeals then found since defense counsel had not requested an accomplice as a matter of fact, that this "error" would be reviewed under the egregious harm standard. Failing to find egregious harm, the court of appeals affirmed the conviction.

However, this Court has steadfastly held for over six decades that the mere potential of being charged with the greater or lesser offense was sufficient to bring a qualifying testifying witness into the purview of the accomplice witness rule. As such, no issue is present whether the court of appeals erred in the analysis as to whether an accomplice witness rule was applied correctly below–because it most certainly was not.

The real issue before this court is whether to conduct the analysis of whether the codefendant's of Mr. Ash were accomplices as a matter of law, under a corrected view of the law. Since this Court reviews only "decisions" of the court of appeals, and is bound to review matters fairly presented by the grant of the petition for

discretionary review, Mr. Ash argues this matter should be summarily reversed, and remanded to the court of appeals.

However, should this Court proceed to make this determination, the showing necessary to bring one into the accomplice as a matter of law rule is that probable cause existed to arrest the codefendant. Here, the four female companions in Mr. Ash's vehicle were accomplices as a matter of law.

This Court has provided some broad tests for a determination of who is an accomplice witness. A court may look to events before, during and after the commission of the offense, and reliance may be placed on actions that show an understanding and common design to do a certain act. Both presence of a witness at the scene of the offense, and facts that tend to show the witness was an accessory to the offense, or at least that he failed to reveal or actively concealed it, are circumstances that, though each standing alone would not establish the witness as an accomplice, in combination with other facts may suffice to show the witness was a participant. In determining whether to charge a jury, when the evidence clearly shows that the witness is an accomplice witness as a matter of law, the trial court has a duty to so instruct the jury.

Sufficient links[30] to the can be drawn to cocaine can be drawn to each person in the vehicle, making them accomplices as a matter of law. The trio of dancers all admitted to possession of or were caught with Xanax during the night, had proximity to the cocaine, had witnessed a large amount of cash being counted, with at least one making furtive gestures during the stop, and had smoked marijuana in the vehicle throughout the day. In the alternative, sufficient evidence existed to at least submit the fact issue of whether the trio of strippers were accomplices to the jury.

Ms. Varnado deserves special attention. The ex-girlfriend of Mr. Ash, Ms. Varnado stated that she had accompanied Mr. Ash several times to Crockett, Texas to purchase drugs. She knew that those drugs were being transported to Killeen, Texas for sale. She also participated in obtaining cash from money orders while in Crockett. It is a reasonable inference from the evidence to show her participation in the movement of funds from the sale of drugs. As such, Ms. Varnado was a party to the offense on the date in question, making her an accomplice as a matter of law. Because all four codefendants in this matter fall under the accomplice as a matter of law rule, this Court should so find, and remand to this matter to the court of appeals for a harm analysis.

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[30] Apparently not content with the label "affirmative links," this Court shortened the name of this legal theory to "links." *Evans v. State*, 202 S.W.3d 158, 162 n.9 (Tex. Crim. App. 2006); *see also Crenshaw v. State*, No. 10-11-00244-CR, 2012 WL 5292961, at *2 (Tex. App.—Waco Oct. 25, 2012, no pet) (mem. op., not designated for publication) (noting this change).

Ground for Review Restated:

The trial court erred in refusing Mr. Ash's properly requested accomplice witness instructions, resulting in reversible error.

> Ash argues that the four women in the Suburban with Ash, were accomplices as a matter of law and thus, the trial court erred in failing to submit that instruction. However, none of these women were indicted for possession of cocaine with the intent to deliver as was Ash. Nor were any of them indicted for a lesser included offense of that crime. Thus, none of these women were accomplices as a matter of law, and the trial court did not err in failing to submit an accomplice-as-a-matter-of-law instruction.[31]

Within this paragraph, the Waco court of appeals erroneously turned Texas law of accomplice witness[32] testimony on its head.

The Waco court began its inopportune journey down the wrong road by first claiming that this Court has "vacillated" about the applicable rules on assigning the correct status on who is an accomplice witness as a matter of law.[33] Then, the Waco court found that since none of the codefendants had been indicted for possession of cocaine with the intent to deliver as was , nor were any of them indicted for a lesser

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[31] *Ash v. State*, No. 10-14-00405-CR, 2016 WL 455121, at *2 (Tex. App.—Waco Feb. 4, 2016, pet. granted) (mem. op., not designated for publication).

[32] *Harris v. State*, 645 S.W.2d 447, 457 (Tex. Crim. App. 1983) (en banc) (stating an an accomplice witness is a person who was a participant in the crime at issue, whether before, during, or after its commission.)

[33] *Ash*, 2016 WL 455121, at *2, n.1. ("The Court's current case authority does not include [an uncharged] witness as an accomplice as a matter of law.").

included offense of that crime, Mr. Ash was correctly denied the accomplice as a matter of law instruction.[34]

Color me amazed.[35] This Court has never held that an actual charging instrument must be returned against persons who are potential accomplice witnesses to make them so, nor ever been "inconsistent" about this issue. In fact, dating to 1954, this Court has consistently held that a witness can be an accomplice witness as a matter of law if he or she ***could have been*** charged with the same offense as the defendant or a lesser included offense.[36] Not only has this Court found this to be the proper test, but this is the standard in a majority of other states, and in two federal

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[34] *Id.* at *2.

[35] *Aldrighetti v. State*, 507 S.W.2d 770, 775 (Tex. Crim. App. 1974) (Onion, P.J., dissenting).

[36] *Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013); *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007); *Cocke v. State*, 201 S.W.3d 744, 747–48 (Tex. Crim. App. 2006); *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004); *Kutzner v. State*, 994 S.W.2d 180, 187 (Tex. Crim. App. 1999); *Blake v. State*, 971 S.W.2d 451, 454–55 (Tex. Crim. App. 1998) ("We have also repeatedly stated that a person is an accomplice if he or she could be prosecuted for the same offense as the defendant, or a lesser included offense."); *Ex parte Zepeda*, 819 S.W.2d 874, 876 (Tex. Crim. App. 1991); *Crank v. State*, 761 S.W.2d 328, 349 (Tex. Crim. App. 1988); *Gooch v. State*, 665 S.W.2d 112, 116 (Tex. Crim. App. 1984); *Harris*, 645 S.W.2d at 456; *Ferguson v. State*, 573 S.W.2d 516 (Tex. Crim. App. 1978) ("[O]ne is not an accomplice witness who cannot be prosecuted for the offense with which the accused is charged."); *Silba v. State*, 275 S.W.2d 108, 109 (Tex. Crim. App. 1954) ("A sound rule which we think has been accepted in most jurisdictions is this: If all the evidence shows that the witness is answerable to the law as a principal or an accomplice to the crime or an accessory to the accused or if he has been indicted as such, then he is an accomplice witness as a matter of law."); *see also Lewis v. State*, 448 S.W.3d 138, 143 (Tex. App.—Houston [14th Dist.] 2014), *cert. denied*, 136 S. Ct. 52 (2015).

circuit courts.[37] Thus, the conclusion of the Waco court of appeals that one need be officially charged (by indictment/information) is "[w]rong, wrong, wrong."[38]

This appears to conclude the question before this Court, as this Court reviews "decisions" of the courts of appeals.[39] Here, the Waco court of appeals found that the other parties arrested with Appellant could not be an accomplice as a matter of law solely because they were not formally charged.[40] As a general rule, this Court does not reach the merits of any party's contention when it has not been addressed by the lower appellate court.[41] In a similar situation, this Court exercised its power of supervision to vacate the judgment of the court of appeals, remanding the cause for

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[37] *People of Territory of Guam v. Dela Rosa*, 644 F.2d 1257, 1260–61 (9th Cir. 1980); *United States v. DeCicco*, 424 F.2d 531, 532 (5th Cir. 1970); *Henderson v. State*, 503 S.W.2d 889, 894 (Ark. 1974); *Daniel v. State*, 906 So. 2d 991, 1000 (Ala. Crim. App. 2004); *Carman v. State*, 602 P.2d 1255, 1260 (Alaska 1979); *State v. Broadfoot*, 566 P.2d 685, 686–87 (Ariz. 1977) (en banc); *People v. Pappadiakis*, 705 P.2d 983, 987 (Colo. App. 1985), *aff'd sub nom. Peltz v. People*, 728 P.2d 1271 (Colo. 1986); *Newton v. State*, 178 So. 2d 341, 345 (Fla. Dist. Ct. App. 1965); *Lanier v. State*, 1 S.E.2d 405, 409 (Ga. 1939); *People v. Howard,* 568 N.E.2d 56, 71–72 (Ill. App. Ct. 1991); *State v. Sallis*, 238 N.W.2d 799, 802 (Iowa 1976); *Hall v. Commonwealth*, 248 S.W.2d 417, 419 (Ky. 1952); *Silva v. State*, 28 A.3d 1226, 1233 (Md. 2011); *People v. Threkeld*, 209 N.W.2d 852, 855 (Mich. Ct. App. 1973); *State v. Palubicki*, 700 N.W.2d 476, 487 (Minn. 2005); *Hye v. State,* 162 So. 3d 818, 823 (Miss. Ct. App. 2013), *aff'd*, 162 So. 3d 750 (Miss. 2015); *People v. Kocsis*, 28 N.Y.S.3d 466, 470–71 (N.Y. App. Div. 2016); *State v. Pacheco*, 506 N.W.2d 408, 409 (N.D. 1993); *Postelle v. State,* 267 P.3d 114, 126 (Okla. Crim. App. 2011); *State v. Oatney*, 66 P.3d 475, 482 (Or. 2003); *Commonwealth v. Richey*, 378 A.2d 338, 340 (Pa. 1977); *State v. Lingwall*, 398 N.W.2d 745, 747 (S.D. 1986); *State v. Jones*, 450 S.W.3d 866, 888 (Tenn. 2014); *State v. Smith*, 706 P.2d 1052, 1055 (Utah 1985), *State v. Jennings*, 666 P.2d 381, 383 (Wash. Ct. App. 1983).

[38] *Tone v. State*, 505 S.W.2d 300, 302 (Tex. Crim. App. 1973) (Onion, P.J., dissenting).

[39] *Cooper v. State*, 933 S.W.2d 495, 496 (Tex. Crim. App. 1996).

[40] *Ash,* 2016 WL 455121, at *2.

[41] *Id.*

reconsideration.[42] As such, Mr. Ash requests summary remand to the Court of Appeals to reconsider whether the foursome with Mr. Ash were "accomplices as a matter of law," under a proper framework of law.

A. The passengers were all accomplice witnesses at law.

In the alternative, and without waiver, if this Court more fully conducts a review of this matter, it must find that the four passengers were all accomplice witness as a matter of law, as all could have been "charged with" the greater or lesser included offenses.

The mere potential of charges is the required test for determination of the applicability of this issue. To be "charged" under Texas law means the filing of a complaint or the return of an indictment by a grand jury against a defendant.[43] The showing necessary to charge a person with a crime in Texas is probable cause.[44] The testimony of one witness can suffice to establish probable cause.[45] A showing of

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[42] *Lee v. State*, 791 S.W.2d 141, 142 (Tex. Crim. App. 1990); see also *Tallant v. State*, 742 S.W.2d 292, 294 (Tex. Crim. App. 1987) ("Our review is limited to those points of error decided by the courts of appeals, included in petitions for review and granted as grounds for review."), *abrogated on other grounds by Wilson v. State*, 311 S.W.3d 452, 474 (Tex. Crim. App. 2010)

[43] *Bermen v. State*, 798 S.W.2d 8, 10 (Tex. App.—Houston [1st Dist.] 1990), *pet. dism'd,* 817 S.W.2d 86 (Tex. Crim. App. 1991) (en banc) (per curiam).

[44] The standard for probable cause to indict is the same as that for probable cause to arrest. *See Garcia v. State*, 775 S.W.2d 879, 881 (Tex. App.—San Antonio 1989, no pet.).

[45] *See Perez v. State*, 590 S.W.2d 474, 478 (Tex. Crim. App. [Panel Op.] 1979).

insufficient evidence to convict does not equate to a lack of probable cause to indict.[46] As such, all that is necessary to be an accomplice witness as a matter of law under Texas law is for probable cause to arrest exist the putative accomplice.

Other decisions suggest that the law deems an accomplice as a matter of law only when uncontradicted evidence or evidence is so persuasive a jury could not reasonably disregard it, or the facts are such that it cannot be questioned that the witness is guilty of the crime, *i.e.*, an accomplice.[47] This is likely to be the case, for example, if the witness in the course of his own testimony acknowledges participation in the offense with which the defendant is charged.[48] As such, a witness is not an accomplice as a matter of law if there is some dispute regarding the facts necessary to make the witness guilty.[49] Similarly, although this is perhaps somewhat less clear, a witness is not an accomplice as a matter of law if there is a question whether the established facts constitute criminal involvement in the events.[50] Ultimately, the question is answered by looking at the events surrounding the offense and judging

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46 *Ex parte Thomas*, 956 S.W.2d 782, 786 (Tex. App—Waco 1997, no pet.); *Harris County Dist. Attorney's Office v. M.G.G.*, 866 S.W.2d 796, 799 (Tex. App.—Houston [14th Dist.] 1993, no writ).

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

whether the witness's actions show an understanding and common design to commit acts that would render the witness a party to the offense.[51]

This Court has provided further broad tests for a determination of an accomplice witness. A court may look to events before, during and after the commission of the offense, and reliance may be placed on actions that show an understanding and common design to do a certain act.[52] Both presence of a witness at the scene of the offense, and facts that tend to show the witness was an accessory to the offense, or at least that he failed to reveal or actively concealed it, are circumstances that, though each standing alone would not establish the witness as an accomplice, in combination with other facts may suffice to show the witness was a participant.[53] However, mere presence is not sufficient for accomplice witness status.[54] In determining whether to charge a jury, when the evidence clearly shows that the witness is an accomplice witness as a matter of law, the trial court has a duty to so instruct the jury.[55]

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[51] *See Marlo v. State*, 720 S.W.2d 496, 499 (Tex. Crim. App. 1986) (holding flight by a witness was properly considered in determining whether witness was accomplice).

[52] *Id.*

[53] *Id.*

[54] *Brooks v. State*, 686 S.W.2d 952, 957 (Tex. Crim. App. 1985) (en banc).

[55] *Druery*, 225 S.W.3d at 498.

Thus, to decide whether the four females riding with Mr. Ash were accomplices at law or by fact requires a review of the elements of the offense in question. The elements of possession with intent to deliver are knowing possession with intent to distribute.[56] Generally, intent to distribute can be inferred from the possession of a large amount of controlled substance.[57] The lesser included offense of possession is proven when the State establishes that (1) the accused exercised control, management, or care over the substance; and (2) the accused knew the matter possessed was contraband.[58] Whether this evidence is direct or circumstantial, "it must establish, to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous."[59] Mere presence at the location where drugs are found is insufficient, by itself, to establish actual care, custody, or control of those drugs.[60] However, presence or proximity, when combined with other evidence, either direct or circumstantial (e.g., "links"), may be sufficient to establish that element beyond a reasonable doubt.[61] Evidence which links the defendant to the controlled substance

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56 *Hawkins v. State*, 687 S.W.2d 48, 50 (Tex. App.—Dallas 1985, pet. ref'd).

57 *Bethancourt-Rosales v. State*, 50 S.W.3d 650, 653 (Tex. App.—Waco 2001, pet. ref'd).

58 *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005).

59 *Id.* at 405–06.

60 *Evans*, 202 S.W.3d at 162.

61 *Id.*

suffices for proof that he possessed it knowingly.[62] It is not the number of links that is dispositive, but rather the logical force of all of the evidence, direct and circumstantial.[63]

In possession of controlled substance cases, two evidentiary requirements must be met: the State must prove the defendant exercised actual care, control and management over the contraband; and that he had knowledge that the substance in his possession was contraband.[64] Control may be shown either by actual or constructive possession,[65] and knowledge[66], being subjective, must usually be inferred to some

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[62] *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995).

[63] *Santiesteban-Pileta v. State*, 421 S.W.3d 9, 12 (Tex. App.—Waco 2013, pet. ref'd).

[64] *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995); *Harris v. State*, 994 S.W.2d 927, 933 (Tex. App.—Waco 1999, pet. ref'd); *Collins v. State*, 901 S.W.2d 503, 505 (Tex. App.—Waco 1994, pet. ref'd).

[65] Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others. *United States v. Bailey*, 553 F.3d 940, 944 (6th Cir. 2009).

[66] A traditional analysis of links affords assistance in analyzing this case because that analysis "tends to focus on a defendant's knowledge of the contraband," which is the central issue of this matter. *Woodard v. State*, 355 S.W.3d 102, 110 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) .

extent.[67] In other words, "[p]ossession means more than being where the action is; it involves the exercise of dominion and control over the thing allegedly possessed."[68]

Here, because Appellant was not found in actual possession of the contraband, the State must prove "constructive possession." The State can accomplish this task with "links," which prove that he was "conscious of his connection with it and [knew] what it was."[69] This State's courts have designed the links rule to protect the innocent bystander from conviction based solely upon his mere presence to someone else's drugs.[70] A link is established by showing additional facts and circumstances that show the defendant's knowledge and control of the contraband. The burden of showing these links rests on the State.[71]

No set formula exists to dictate a finding of links sufficient to support an inference of knowing possession of contraband.[72] The logical force of the evidence

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67 *Autran v. State*, 830 S.W.2d 807, 811 (Tex. App.—Beaumont 1992), *rev'd on other grounds*, 887 S.W.2d 31 (Tex. Crim. App. 1994); *see also Grant v. State*, 989 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

68 *Payne v. State*, 480 S.W.2d 732, 734 (Tex. Crim. App. 1972).

69 *Brown*, 911 S.W.2d at 747.

70 *Poindexter*, 153 S.W.3d at 406.

71 *Damron v. State*, 570 S.W.2d 933, 935 (Tex. Crim. App. 1978).

72 *Isbell v. State*, 246 S.W.3d 235, 238 (Tex. App.—Eastland 2007, no pet.).

is dispositive; it is not the number of links.[73] Thus, the number of factors present is less important than the logical force of those factors, alone or in combination, in establishing the elements of the offense.[74] In any event, mere presence at the scene is not sufficient to establish unlawful possession of a controlled substance.[75] Texa courts have set out a number of "links":[76]

1	The defendant's presence when the search was conducted.[77]
2	The contraband was in plain view.[78]
3	The defendant's proximity to and the accessibility of the narcotics.[79]
4	The defendant was under the influence of narcotics when arrested.[80]
5	The defendant possessed other contraband when arrested.[81]

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[73] *Evans*, 202 S.W.3d at 162; *see also id*. at 166–67 (Womack, J. concurring) ("The issue is whether there was evidence of circumstances, in addition to mere presence that would adequately justify the conclusion that the defendant knowingly possessed the substance.").

[74] *Collins*, 901 S.W.2d at 506.

[75] *Id.* at 505.

[76] However, this list of factors is nonexclusive. *Evans*, 202 S.W.3d at 161. "These are simply some factors which may circumstantially establish the legal sufficiency of the evidence to prove a knowing possession." *Id.* "They are not a litmus test." *Id.* Rather, as noted, it is the logical force of all of the evidence that is dispositive. *Id.* at 162.

[77] *Damron*, 570 S.W.2d at 936.

[78] *Deshong v. State*, 625 S.W.2d 327, 329 (Tex. Crim. App. [Panel Op.] 1981); *Collins*, 901 S.W.2d at 506.

[79] *Collins*, 901 S.W.2d at 506.

[80] *Id.*

[81] *Id.*

6	The defendant made incriminating statements when arrested.[82]
7	The defendant attempted to flee.[83]
8	The defendant made furtive gestures.[84]
9	An odor of contraband.[85]
10	Other contraband or drug paraphernalia was present.[86]
11	The defendant owned, rented, controlled or had the right to possess the place where the drugs were found.[87]
12	The defendant was driving the vehicle where the drugs were found.[88]
13	Whether any forensic evidence (*e.g.*, fingerprints, DNA, etc.) connects the defendant to the contraband and its container.[89]
14	The search turned up drugs in plain view or in areas "private" to the accused.[90]
15	The defendant's name appeared on receipts, envelopes, and other documents found in the premises.[91]

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Olguin v. State*, 601 S.W.2d 941, 943 (Tex. Crim. App. [Panel Op.] 1980); *Isaacs v. State*, 770 S.W.2d 76, 79 (Tex. App.—El Paso 1989, pet. ref'd).

[88] *Collins*, 901 S.W.2d at 506.

[89] *Triplett v. State*, 292 S.W.3d 205, 209 (Tex. App.—Amarillo 2009, pet ref'd).

[90] *Siroky v. State*, 653 S.W.2d 476, 479 (Tex. App.—Tyler 1983, pet. ref'd),

[91] *Herrara v. State*, 561 S.W.2d 175, 179 (Tex. Crim. App. 1978).

16	The accused had large amounts of cash and/or a weapon.[92]
17	The contraband was found on the same side of the car seat as where the accused was sitting.[93]
18	The accused was observed in a suspicious area under suspicious circumstances.[94]
19	The place the drugs were found was enclosed.[95]
20	Whether the conduct of the defendant indicated a consciousness of guilt.[96]
21	Whether the defendant had a "special connection" to the contraband.[97]
22	Whether the physical condition of the defendant indicated recent consumption of the contraband in question.[98]
23	Whether the persons present gave conflicting statements about relevant matters.[99]
24	The quantity of the contraband discovered.[100]

[92] *King v. State*, 710 S.W.2d 110, 113 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd).

[93] *See Hyett v. State*, 58 S.W.3d 826, 830 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd)

[94] *Jenkins v. State*, 76 S.W.3d 709, 712 (Tex. App.—Corpus Christi 2002, pet. ref'd).

[95] *Collins*, 901 S.W.2d at 506.

[96] *Evans*, 202 S.W.3d at 162 n.12.

[97] *Triplett*, 292 S.W.3d at 209.

[98] *Id.*

[99] *Id.*

[100] *Id.*

Lastly, the defendant must be linked to the contraband itself rather than the immediate area where it was found.[101] When narcotics are secreted, the State must address whether the defendant knew of the existence of the secret place and its contents.[102]

Set forth below in four tables, is the evidence that serves as a link to the alleged contraband found in the vehicle to each of the four accomplice witnesses.

DEONDRA MEDFORD

Ms. Medford sees a large amount of cash on a table while in Crockett, Texas.	(2 R.R. at 200).
A hunt for Xanax "bars" is begun, with Ms. Medford joining in on the search.	(2 R.R. at 204–05).
The two Xanax pills purchased by Ms. Medford while in Crockett, Texas were paid for by her.	(2 R.R. at 210-14).
A Xanax pill was found by police in Ms. Medford's waistband.	(2 R.R. at 207).

[101] *Mendoza v. State*, 583 S.W.2d 396, 399 (Tex. Crim. App. 1979) (Roberts J., dissenting).

[102] *Vargas v. State*, 883 S.W.2d 256, 263 (Tex. App.—Corpus Christi 1994, pet. ref'd).

Ms. Medford had a large amount of cash in her purse, estimated at $600.00.[103]	(2 R.R. at 209)
While in Crockett, Texas, Ms. Medford stated the she "believed" that Mr. Ash was allegedly "getting drugs."	(2 R.R. at 226).

KEANDRA JENNINGS

Ms. Jennings sees cash on a table while in Crockett, Texas.	(2 R.R. at 238).
Two Xanax pills were purchased by Ms. Jennings while in Crockett, Texas.	(2 R.R. at 240).
Ms. Jennings was the driver of the vehicle at the time of the traffic stop leading to discovery of the cocaine.	(2 R.R. at 242).

DEMARSHAYE ALEXANDER

Ms. Alexander witnesses a person counting what was testified to be $4000.00 in cash.	(3 R.R. at 22).
She requests and has Mr. Ash try to find "Xanax bars," which she knows is "illegal" because she does not have a prescription. She later ingested two Xanax.	(3 R.R. at 28–30).
There was a smell of "burnt marijuana" in the car because Ms. Alexander had smoked marijuana "the whole time" (with others) in the vehicle earlier that evening.	(3 R.R. at 59-60).

[103] An amount below this–$537.21–has been determined to be a "large amount of cash." *Sorrells v. State*, No. 03–08–00072–CR, 2010 WL 1404625, at *11 (Tex. App.—Austin Apr. 9, 2010, pet. ref'd) (mem. op., not designated for publication); *see also Ash v. State*, No. 10–06–00078–CR, 2007 WL 765270 at *3–4*(Tex. App.—Waco March 14, 2007, pet. ref'd) (mem. op., not designated for publication) (holding a link was established where the evidence showed that defendant had $516.00); *Bean v. State*, Nos. 05–06–01487–CR, 05–06–01488–CR, 05–06–01489–CR, 2007 WL 3293633 at *5 (Tex. App.—Dallas Nov.8, 2007, pet. ref'd) (mem. op., not designated for publication) (finding a link established where the evidence showed defendant had more than $500.00); *see also United States v. $242,484.00*, 389 F.3d 1149, 1161 (11th Cir. 2004) ("Although the quantity of the cash alone is not enough to connect it to illegal drug transactions it is a significant fact and weighs heavily in the probable cause calculus.").

JEFFERI VARNADO

At the time of the incident, Ms. Varnado was the girlfriend of Mr. Ash.	(3 R.R. at 71).
She would take frequent trips with Mr. Ash to Crockett to visit family and purchase drugs. "Because, previous trips we've made to Crockett, he's gone to go pick up drugs."	(3 R.R. at 74–75). (3 R.R. at 98).
When such drug purchases were made, one would "see a lot of money."	(3 R.R. at 140).
Ms. Varnado would be aware that during prior alleged drug purchases, that Mr. Ash would "hide it in the car somewhere" and that upon return to Killeen, Mr. Ash would allegedly "sell it."	(3 R.R. at 140).
Mr. Ash and Ms. Varnado purchase "Spice," a "synthetic marijuana in Houston.	(3 R.R. at 78).
Ms. Varnado smoked the "Spice"; the other three females smoked marijuana while in Crockett.	(3 R.R. at 80, 87).
While in Crockett, and during a visit with Mr. Ash's family home, Ms. Varnado goes to Walmart to pick up a MoneyGram, getting approximately $800.00 in cash.[104]	(3 R.R. at 82–83).
The three females with Ms. Varnado sought the purchase of Xanax themselves without assistance from Mr. Ash.	(3 R.R. at 111).
Ms. Varnado stated that police noticed "green residue" on her person.	(3 R.R. at 96).
Ms. Varnado stated that she is capable of recognizing cocaine by sight.	(3 R.R. at 97).

The evidence elicited from the four females witnesses set out above meet several "links." Each was present when the search was conducted, each with

[104] The true amount was $515.00. (3 R.R. at 153).

proximity to and the accessibility of the narcotics, all under the influence of narcotics when arrested, an odor of marijuana was present in the truck and all possessed other contraband when arrested.[105] In fact, proximity and being under the influence[106] was sufficient to link at least one defendant under Texas law.[107]

However, Ms. Varnado's activities certainly merit further attention. Ms. Varnado had personal knowledge of the purported reason that Mr. Ash would be visiting Crockett, Texas – to pick up drugs to distribute later. Furthermore, during her presence and Crockett, Texas on the dates in question, she participated in getting cash from money orders. Under the law of parties, "[a] person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both."[108] A person is "criminally responsible" for an offense committed by the conduct of another, if acting with intent to promote or assist the commission of the offense, a person solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.[109]

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105 *See Ramirez v. State*, No. 02-09-00285, 2010 WL 4676987, *3–*4 (Tex. App.—Fort Worth Nov. 18, 2010, no pet.) (mem. op., not designated for publication) (holding that the absence of a majority of these factors weighed against the State's case).

106 Along with statement's to law enforcement.

107 *Smith v. State*, No. 07-05-0289-CR, 2007 WL 2002897, *2 (Tex. App.—Amarillo July 11, 2007, no pet.) (mem. op., not designated for publication).

108 TEX. PENAL CODE ANN. § 7.01(a) (West 2014).

109 *Frank v. State*, 183 S.W.3d 63, 72 (Tex. App.—Fort Worth 2005, pet. ref'd).

Evidence is sufficient to convict under the law of parties when the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement.[110] In determining whether a defendant participated in an offense as a party, the fact-finder may examine the events occurring before, during, and after the commission of the offense and may rely on actions of the defendant that show an understanding and common design to commit the offense.[111] Persons who "wash" money are all as necessary to the success of the venture as is the retailer.[112] Similar behavior was sufficient to uphold a conviction.[113]

As stated previously, an accomplice witness is a person who was a participant in the crime at issue, whether before, during, or after its commission.[114] The witness must be subject to prosecution for the offense to be considered an accomplice witness.[115] In addition, the record must show the person affirmatively acted to

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110 *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994) (op. on reh'g).

111 *Ransom*, 920 S.W.2d at 302.

112 *United States v. Orozco-Prada*, 732 F.2d 1076, 1080 (2d Cir. 1984).

113 *See Woods v. State*, 734 S.W.2d 414, 416 (Tex. App.—Houston [1st Dist.] 1987), *rev'd on other grounds by* 758 S.W.2d 285 (Tex. Crim. App. 1988) (en banc) (holding that the defendant's presence during a conversation about a drug sale and during the actual drug sale, and also that defendant assisted in the commission of the offense by relaying appellant's request for drugs to others was legally sufficient to sustain the conviction of that defendant as a party to the offense).

114 *Harris*, 645 S.W.2d at 457.

115 *McFarland v. State*, 928 S.W.2d 482, 514 (Tex. Crim. App. 1996).

promote commission of crime either before, during, or after offense, to be an accomplice as a matter of law.[116] Ms. Varnado's actions alone merit a charge of being an accomplice witness as a matter of law. In addition, with the links supporting at least possession of the controlled substance, an accomplice witness – as a matter of law – charge should have been given concerning all four female witnesses.

Certainly, each of these witnesses could be prosecuted for the same offense as the defendant or a lesser included offense.[117] And the fact that none of the four had pending charges is of no event– whether the person is actually charged and prosecuted for their participation is irrelevant to the determination of accomplice status—what matters is the evidence in the record."[118]

B. Harm analysis.

As a general rule, this Court does not make findings of harm in cases taken on discretionary review unless such a finding is necessary to the disposition of questions presented to this Court.[119] The issue of harm, as viewed by Mr. Ash, would not be

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116 *Kunkle v. State*, 771 S.W.2d 435, 441 (Tex. Crim. App. 1986).

117 *See Blake*, 971 S.W.2d at 454–55; *see also Upchurch v. State*, 23 S.W.3d 536, 538 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (holding that possession a controlled substance is a lesser included offense of possession with the intent to distribute the same controlled substance).

118 *Biera v. State*, 280 S.W.3d 388, 392 (Tex. App.—Amarillo 2008, pet. ref'd).

119 *Reynolds v. State*, 848 S.W.2d 148, 149–50 (Tex. Crim. App. 1993).

necessary to the granted issue in this matter. As such, "[t]he determination of harm, if any, should be left for the Court of Appeals."[120]

PRAYER FOR RELIEF

Mr. Ash was denied a fair trial, and prays that this Court should find that the matter requires reversal, with a remand to the Tenth Court of Appeals to determine whether Mr. Ash was entitled to an instruction that the codefendant's were accomplice witnesses as a matter of law. In the alternative and without waiver, Mr. Ash requests this Court find that he was entitled to an accomplice witness as a matter of law instruction. That requires this Court reverse and remand this matter to the court of appeals for a harm analysis, or for whatever relief he may be entitled.

Respectfully submitted,

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120 *Id.*

CERTIFICATE OF SERVICE

A copy of this was delivered to the Falls County District Attorney's Office on May 5, 2015 by this Court's electronic filing service.

/s/ Stan Schwieger
Stan Schwieger

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

Certificate of Compliance with Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of TEX. R. APP. P. 9.4(i) because this brief contains 6539 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

2. This brief complies with the typeface requirements and the type style requirements of TEX. R. APP. P. 9.4(e) because this brief has been produced on a computer in conventional typeface using WordPerfect X7 in Times New Roman 14 point font in the body of the brief and Times New Roman 12 point font in the footnotes.

3. This electronically filed brief is free from any computer viruses, malware or other harmful programs.

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